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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91176744
Party	Defendant Michael Craig Silver
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of : Michael Craig Silver
Serial No. : 78/823,155
Filed : February 24, 2006
For : SUPER HERO

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DC COMICS and	:
MARVEL CHARACTERS, INC.	:
	:
Opposers,	:
	:
vs.	:
	:
MICHAEL CRAIG SILVER	:
	:
Applicant,	:
-----X	

Opposition # 91176744

APPLICANT'S RESPONSE TO OPPOSER'S MOTION FOR SUMMARY JUDGEMENT

The Applicant for serial number 78823155 asserts and will show evidence that shows that there are genuine issues of material fact to be tried and, in addition, a Summary Judgment Sua Sponte should be granted in favor of the Applicant. A genuine issue of material fact is raised by the Applicant by relying on specific facts that establish the existence of an ability and willingness to use the mark in United States commerce to identify its claimed "Super Hero" mark in connection with the goods identified in Application Serial No. 78/823,155. at the time of the filing of the application. Such conclusion follows from the evidence in this matter which provides specific marketing plans, business plans and other documents. In addition, the applicant can rely on evidence of marketing and manufacturing contacts and specific knowledge of the

industry that corroborates the Applicant's bona fide intent to use the subject mark in United States commerce. The subject application should therefore be approved and granted a Summary Judgment Sua Sponte.

I. STATEMENT OF THE FACTS

a. Opposer's Business and Trademark Registrations.

The claim by the Opposers that DC Comics and Marvel are among "the most famous Media companies in the world" is a subjective statement, as well as, their claims of owning "internationally famous characters" and "world-renowned character properties" and should be discounted as such.

The presentation and existence of the Opposer's registered marks should not be weighted against the Applicant's application as they are only applicable to their respective classes and are not of the same class, nor have direct conflict with, as the subject mark of the Applicant's application. The Opposer's related marks are also not in direct conflict with the Applicant's mark and should likewise not be weighed against the Applicant's application.

b. Applicant Michael Silver

Opposer has inaccurately categorized and willfully misguided the Board in its subjective and erroneous opinion of the Applicant's employment status, work experience and education. Although it is true that the Applicant holds a real estate broker's license in the states of California and Nevada and has experience in real estate sales and financing transactions, a true description of the Applicant as a professional entrepreneur

is the accurate job description of the Applicant. The description as a professional entrepreneur of the Applicant correctly recognizes the Applicant's extensive and varied higher education attained and the creation and management of whole-owned businesses by the Applicant.

It is this designation as a professional entrepreneur and the depth of skills and diverse business experiences that define the ability and willingness of the Applicant to use the subject mark, Super Hero, in United States commerce at the time of the filing of the application.

The Opposer's subjective descriptions of the Applicant as having "dabbled in the sale of t-shirts" and "floated between a few business school programs" is a malicious attempt by the Opposer's to tarnish the academic and business achievements that the Applicant has attained. This malicious effort to deceive The Board should be seen by The Board as a bad faith attempt by the Opposer's to tarnish the Applicant's professional reputation.

The Applicant clearly explained in the deposition that he was the owner of several business entities with complementing licenses for each one. The Opposer's reference to the Applicant having "dabbled in the sale of t-shirts" is an irresponsible description of the business experience formally known as West Clay Industries and currently operating as Waveworks/Maiden Waves. The use of the word "dabbled" is an attempt to portray the Applicant's business activities as non-professional. More than just t-shirts have been and are sold through this business entity. Apparel sales to the general public and the sponsorship of sporting teams with various apparel merchandise has been executed with great results to many different corporate accounts. Such corporate accounts that the

Applicant's business apparel entity has done business with includes: Duty Free Shops located in large international airports, Five-Star hotel gift shops and ski and snowboard teams of corporate owned resorts. These business relationships are in addition to many other independent and corporate owned retail establishments. The Applicant's professional experience in this apparel sales category establishes the ability and willingness to bring consumer products, and the subject Super Hero mark, to the United States commercial markets.

Opposer's reference to the Applicant in the following description that, "He floated between a few business school programs" is similarly a malicious effort to tarnish the higher education that the Applicant has pursued and that is relevant to the bona fide intent to use application of the mark Super Hero. The subjective and sophomoric description by the Opposers to explain the Applicant's change of a business school programs by the using the word "floated" is a direct attack on the Applicant's credibility, focus and tenacity to achieve complementing business education to an already existing degree in law. The Applicant's successful and focused completion of business courses included the following business school graduate classes: Financial Management, Economics of the Firm, Operations Management, Investment Management, Ethics, Accounting, Macroeconomics, and Management Principles. The effort and focus to successfully complete the business courses listed above to compliment work experiences, research and other higher education degrees further establishes the ability and willingness of the Applicant to execute and follow through with an intent to use application for a business endeavor.

Additional relevant education history of the Applicant includes the successful completion of all pre-medical course requirements in college to be eligible to take the Medical College Admissions Test (MCAT); this requisite course work includes the full required class series of General Chemistry, Organic Chemistry, Biology and Physics. The Applicant also successfully passed the additional undergraduate courses of Anatomy, Physiology and an additional Organic Chemistry course to supplement the required pre-medical Courses that the Applicant successfully completed. Subsequently, the Applicant completed the Kaplan's educational preparatory course for the MCAT and successfully took the MCAT exam. Recently, the applicant has also become an Affiliate Member of American Chemical Society to further his profession interests and business prospects in this industry.

Disclosure of the Applicant's ownership of the TEXASTEA Lubes lubricant brand was also made during the deposition. This brand, like all other businesses that the Applicant owns, is owned 100% by the Applicant. This TEXASTEA Lubes brand is a line of automotive, heavy duty and industrial lubricant products that fall under the corporate umbrella of WCL Services, Inc.; which is owned 100% by the Applicant. The TEXASTEA brand has received licenses for several of the TEXASTEA products by the American Petroleum Institute. The Applicant presents this relevant licensing information that was received from the American Petroleum Institute for his TEXASTEA products to prove that a professional entrepreneur, such as the Applicant, can achieve licenses from a governing body of an industry, such as the FDA, without having had direct prior business experience in an industry, such as the sunscreen industry, if the

individual has the proper business experience, education, disposition and tenacity.

Applicant has presented the aforementioned specific facts in regards to his business and education experiences to establish the existence of an ability and willingness to use the Super Hero mark in the United States at the time of the filing of the application. The Applicant's educational and business experiences has instilled in him the ability to easily understand the scientific and business parameters and requirements to begin sales of the intended sunscreen product. In addition, the Applicant has displayed the willingness to pursue and finalize a business objective of creating a sunscreen product which the Applicant has displayed previous interest, education and discipline with by the creation of the Maiden Waves formula that has previously been presented to the Opposers.

At the time of filing the Application, Applicant had created a business plan, had researched the basic information on the logistics of creating the proposed products, had conducted a market study and had several manufacturing contacts. Since filing the application three years ago the Applicant has made further progress in this regard.

The Applicant does have a checklist that should be considered a business plan for the purposes of the sunscreen product. This checklist was recently recognized by the Applicant as substantial enough to serve as a credible business plan and checklist for the Super Hero product. The attached checklist was created years ago by the applicant for use by all of his business enterprises. However, since it's creation, this business checklist was added to for the specific purpose of aiding the development of the Super Hero mark. The lack of presentation previously of this checklist was a result of the Applicant not recognizing its applicability to the proceeding as a business plan and as a result of

external circumstances of the Applicant's personal and business affairs which have served to reduce the general organization and orientation of the Applicant. The omission of the checklist was not intentional.

External circumstances that have contributed to the Applicant's reduced organization and orientation to this opposition proceeding since the application of the Super Hero mark was filed by the applicant include: the forced relocation of the Applicant's office, a forest fire at the Applicant's residence which caused extensive property damage that resulted in the residential relocation of the Applicant and a separate medical condition which required the Applicant to be hospitalized for surgery.

The existence and operation of current businesses by the Applicant for over 12 years has resulted in the Applicant acquiring numerous manufacturing contacts for the other businesses that he owns. These existing manufacturing contacts that the Applicant has used and the ability to received terms of credit from numerous suppliers substantiates the professional entrepreneurial experience that the Applicant possesses. The acquisition of other suppliers for the packaging of sunscreen product would be as easy for such a professional entrepreneur as it is for an ordinary consumer to choose a different vegetable off of the grocery store shelf. The ability to find the suppliers in one industry shows that the Applicant is capable to find suppliers in any industry as the process of finding suppliers is all the same. These skills include research and networking and the applicant has exhibited these skills by way of the production of its other business products.

It is this process of coordinating and organizing with different professionals in various industries that the Applicant has direct experience with. The "checkout process" to buy

vegetables, apparel products, lubricant packaging or sunscreen packaging is all the same to a professional businessman.

The Opposer's assertion that the Applicant is not credible because he did not realize that "SPF" stood for "Sun Protection Factor" is wrong as the Applicant was merely not in the proper frame of mind to remember on the spot as he was answering several emails during the deposition on his Blackberry phone and was distracted several other times with phone calls during the proceedings.

c. Applicant Had a Bona Fide Intent To Use the Super Hero Mark.

Applicant had a bona fide intention to use the mark in commerce when he filed the application as is evidenced by the Maiden Waves formula description previously submitted and the newly submitted checklist and notes concerning the Super Hero mark. Marketing contacts were also present as the Applicant had apparel and sticker manufacturer contacts for related businesses with which could be used to create promotional apparel or stickers for the sunscreen brand. Relevant knowledge of the industry was also present in the Applicant at the time of the application as a result of direct education in the sciences that substantiate the Applicant's pre-disposition to the health care field and this type of preventive care product (sunscreen). Further, as is exhibited by the brand and company construction of another of the Applicant's businesses, the TEXASTEALubes brand and the parent company of WCL Services, Inc., the sunscreen product brand of Super Hero can be recognized as a viable brand name product that could be sold from the Waveworks/Maiden Waves company that the Applicant owns. This sunscreen product is compatible with the existing action wear

products of the Applicant's Wavesworks/Maiden Waves company. A sunscreen product is usually found in the Action Sports industry and lifestyle and this makes the sales of the sunscreen product by the Applicant's Wavesworks/Maiden Waves company a natural and compatible fit. The TEXASTEIA brand licenses with the American Petroleum Institute can be confirmed by going to the internet address, <http://eolcs.api.org> and typing in the TEXASTEIA brand name.

The Applicant has established that there is a genuine issue of material fact by showing that he has the ability to understand and fulfill the sunscreen industry's scientific and business aspects through his past undergraduate, graduate and independent education, as well as, through his business acumen to successfully establish other consumer products which also have licenses from industry governing bodies. The willingness of the Applicant to use the mark in the United States to identify his proposed sunscreen product is substantiated by the recognition of the numerous other consumer products the Applicant manufactures and the Applicant's propensity to create consumer products, the Applicant's creation of a Maiden Waves sunscreen formula description that can be used to help create a formula for the Super Hero product since Maiden Waves is owned 100% by the Applicant and this desire is evidenced by the notes that are attached. The notation that describes the use of the Maiden Waves formula description by the Super Hero product, that is referenced by the use of an arrow between the two entities on the note, has been recently discovered, along with the business checklist, by the Applicant as he has been able to organize his affairs after the numerous external forces (as previously described) that had served to disrupt the Applicant's personal and business organization.

The specific facts concerning the Applicant's extensive business experience, relevant education in the sciences, the creation of a sunscreen formula description for a company that is owned 100% by the Applicant and a handwritten note by the applicant which links the Maiden Waves sunscreen formula description to the Super Hero mark all provide substantial support of the Applicant's position that he had a bona fide intent to use the mark in United States commerce at the time of application.

CONCLUSION

For reasons hereinabove set forth, Applicant respectfully requests that the Board issue an order granting the registration to U.S. Application Ser. No. 91/176,744, and Refuse the Opposer's Motion for Summary Judgment. The subject application should therefore be approved and granted a Summary Judgment Sua Sponte.

Dated: July 3, 2009

By: __/Michael Silver/____
Michael Silver
64 Lincoln Drive
Sausalito, CA 94965

Applicant Tel # 530-320-6488

(See Exhibits A-C attached/below)

Proof of Service

I hereby certify that a true and complete copy of the APPLICANT'S RESPONSE TO
OPPOSER'S MOTION FOR SUMMARY JUDGEMENT, and accompanying exhibits,
have been served by mailing said copy on July, 3 2009, via first class mail to:

Jonathan Reichman
Michelle Morris
Michelle Marsh
One Broadway
New York, New York 10004

Exhibit A

Seifert

Plazer Co. file DBA

Polish DBA

Business License

Separate Tel #

Industry Licenses

Business Cards

Logos

Co. Office inspection

Exhibit B.

Maiden Waves Sundersen
formula



SuperHero Name

Exhibit C.

